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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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No. 7

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JOHN BROWN, *et al.*

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**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF FOR THE RETAIL CLERKS INTERNATIONAL ASSOCIATION AS AMICUS CURIAE

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## INTEREST OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION

This brief *amicus curiae* is filed by the Retail Clerks International Association (hereafter, "RCIA") with the consent of the parties.

The RCIA is an international labor organization whose 400,000 members work in retail stores throughout the United States and Canada. It is the parent body of RCIA Local 462 which initiated this case by filing unfair labor practice charges with the National Labor Relations Board (R. 4). In addition to the case at bar, local unions of the RCIA have been parties in two other recent lockout-replace-

ment cases before the National Labor Relations Board. *Industrial Conference Board*, 141 NLRB 625, *enforced in part, juris. reserved in part*, 327 F. 2d 888 (D.C. Cir.); *Food Giant Super Markets*, 145 NLRB No. 124. As is evident, therefore, the RCIA's members have been affected with especial severity by the unfair labor practice being reviewed here, for it is a labor relations weapon which has so far been utilized only by retail employers.[1]

Labor relations in the retail industry are characterized by multi-employer bargaining. Whether nonstruck employers may respond to a strike against one employer in a multi-employer group by locking out and then replacing nonstriking employees is a question of surpassing importance to labor relations in this industry.

The brief for the National Labor Relations Board deals with the two main legal issues of this case thoroughly and ably. First, it demonstrates that the lockout of bargaining unit employees by nonstruck employers, who continue to operate with replacements and supervisors, is discriminatory and coercive of employees in violation of rights guaranteed by Section 7 of the Labor Act, 29 U.S.C. 157, 16 Stat. 136 (Pet. Br., 8-17). Second, it shows that the Court of Appeals exceeded its reviewing authority by reversing the National Labor Relations Board's exercise of informed discretion in "balancing . . . the conflicting legitimate interests" of employees and nonstruck employers who are parties to multi-employer bargaining (Pet. Br., 18-19). *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 96.

As we are in full accord with the legal arguments made in petitioner's brief, we shall not burden the Court by restating them here. Instead, we shall deal with several arguments of policy and labor relations practice which underbrace petitioner's arguments.

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[1] *Industrial Conference Board, supra; Food Giant Super Markets, supra; The Kroger Co.*, 145 NLRB No. 26, 54 LRRM 1361; *Bagdad Bowling Alleys*, 147 NLRB No. 97, 56 LRRM 1301.

## ARGUMENT

### I. The Decision Below is Inimical to the National Labor Policy.

As the statute provides and as the Court has observed, the "fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 237. The decision of the Court of Appeals treats the important issues in this case in the spirit of private commercial litigation, ignoring the underlying statutory purpose and public policy. See *Garner* v. *Teamsters,* 346 U.S. 485, 492-499.

In a crucial and revealing sentence, the Court of Appeals charges that the Board's decision "denies the *privilege of lockout* and . . . refuses any consideration of the existence of the *overriding business purpose* which . . . may justify the invasion of *union rights*" (R. 75; emphasis added). This statement exposes the errors of philosophy and legal analysis in that decision.

First, the court below was wrong in asserting that the Labor Act confers a "privilege of lockout" on employers as a collective bargaining stratagem. It is at most a limited "defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." *NLRB* v. *Truck Drivers, Local No. 449,* 353 U.S. 87, 93. That case, *Buffalo Linen,* created no such monster of mechanical jurisprudence as an automatic "privilege of lockout" and "right of replacement" (R. 74-75) whenever one employer is struck in a multi-employer unit, but the Court there ruled that the Board was authorized to balance conflicting interests of employees and employers where a whipsaw strike threatens the continuation of multi-employer bargaining. *Ibid,* 96-97.

The court below simply did not fairly apply the rationale of *Buffalo Linen* that nonstruck employers have an interest in preventing a whipsaw strike's placing the struck em-

ployer at a serious competitive disadvantage. Where, as here, there is no evidence or finding that the struck employer has been put to any competitive disadvantage by a strike, there can be no justification for the lockout of employees of nonstruck employers, and *a fortiori* there can be no justification for the replacement of such employees.[2] Thus the fundamental error of the lower court's analysis is its narrow, distorted interpretation of *Buffalo Linen*.

Second, in the factual context of this case, there was no "overriding business purpose" (R. 75) nor indeed any business purpose which warranted the lockout of employees by the nonstruck employers. As the one struck employer continued to operate with replacements throughout the strike, there was no economic pressure on him to break from the multi-employer group, and there was no warrant for the other employers, therefore, to lockout their employees. But even if the strike against a single employer who continues to operate warrants a lockout by nonstruck employers, it does not follow that the nonstruck employers are further warranted in replacing their employees. The Court of Appeals' suggestion that there was an "overriding business purpose" which warranted both the lockout *and* the replacement of locked out employees is simply contrary to fact.

Third, the lower court's juxtaposition of an employer's "business purpose" with "union rights" (R. 75) misunderstands the economic balance which the Board is required

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[2] Unlike petitioner, who says that the Board did not disturb the Trial Examiner's finding that the initial lockout by the nonstruck stores was lawful (Pet. Br., p. 10, n. 1), we think the Board did rule that the lockout *as well as* the replacements was unlawful here. The Board's decision carefully noted the Trial Examiner's ultimate conclusion, not his finding on this point. Thus, the Board said: "We agree with the Trial Examiner's *conclusion* that the nonstruck employers violated the Act by *locking out* their employees in the circumstances involved here" (R. 24; emphasis added). It was not merely the replacement of locked out employees which the Board said was unlawful but also the lockout itself.

to strike. It is the right of *employees* which Section 7 protects, not the right of unions or employers. The Board correctly noted that a lockout is a "drastic form of discrimination" against employees, and it found that the non-struck employers "were not justified in replacing their employees" because of a strike called by their union against another employer (R. 25). Viewing the issues here as merely an economic struggle between a union and employers is simplistic, for this is not the legal focus of the Act. Not surprisingly, therefore, the decision of the Court of Appeals reaches a result which is discordant with the policies of the Act.

The decision below may be reduced to this formula: whenever a union strikes one member of a multi-employer group (whether or not the struck employer continues to operate), all other employers are privileged not only to lockout their employees but also to replace them and to continue normal business operations. This result, we think, is profoundly contrary to the plain meaning of Section 7 and to the national labor policy. An automatic right of lockout and replacement will produce more, not less, industrial strife, for inevitably labor disputes will be broadened in their scope and perhaps in their duration, too.[8] In the instant case, for example, what began as a strike against a single employer was converted—by the exercise of such a purported right of lockout and replacement—into an industry-wide, community-wide dispute.

From the enactment of the Labor Act in 1935 until announcement of the decision below in 1963, there were no strike-lockout-replacement cases like this one. Immediately after the Tenth Circuit's decision was reported, however, a number of such lockout-replacement cases arose. (See

[8] Certainly the decision below literally violates the spirit and policy of Section 203(a) of the Labor Act which created the Federal Mediation and Conciliation Service "in order *to prevent or minimize interruptions* of the free flow of commerce growing out of labor disputes." (Emphasis added.)

footnote 1, *supra*.) Unless the decision below is reversed, it is inevitable that this pattern will be universally followed in multi-bargaining with portentous consequences for interstate commerce.

It seems quite likely that the decision below will both discourage participation in and increase tensions in multi-employer bargaining as an instituiton, for that decision radically alters the rules in favor of employers. Operating under the decision below, a union involved in multi-employer bargaining runs the risk that calling even an unsuccessful strike against a single employer may provoke not only an industry-wide lockout of all its members (the classical *Buffalo Linen* situation), but also that its nonstriking members may be replaced while their employers continue their business as usual.

Tensions in labor relations are never higher or more dangerous than when strike breakers are engaged to replace economic strikers, for the striker sees a complete stranger taking the job which he needs to support his family and in which he has an investment of time and skill.[4] The striker at least has exercised some choice in his course of conduct, for he is not required to strike. Indeed, Section 7 guarantees his right not to strike. But the nonstriker who is locked out and then replaced is completely the victim of his employer's economic aggression; he has had no choice. Understandably, therefore, such a labor dispute is calculated to be even more volcanic and intense than the economic strike in which an employer operates with strike breakers.

Unions have little to gain by engaging in multi-employer bargaining under such conditions, for employers in multi-employer bargaining would be able to act offensively and punitively against their employees in a way which the law does not permit individual employers—bargaining alone—

[4] The use of strike breakers is not infrequently the source of violence and other manifestations of industrial strife, for it produces an economic-psychological crisis of great intensity. See, e.g., *Automobile Workers* v. *Russell*, 356 U.S. 634.

to act. (See cases cited in Pet. Br., p. 11, n. 3.) It is fair to predict, therefore, that multi-employer bargaining—with its advantage to the community in terms of promoting stability and uniformity—cannot withstand this cold water shock to its somewhat delicate nervous system. But, if it survives, it must do so under augmented tensions and strains.

## II. The Lockout and Replacement of Employees is Inherently an Offensive Action.

Except in the rarest cases, the distinction between "offensive" and "defensive" lockouts is tenuous. Our own considerable experience has been that the multi-employer lockout is invariably an offensive weapon intended to advance employers' collective bargaining objectives, not primarily to prevent atomization of multi-employer bargaining. *Buffalo Linen* has been the source of this mischief, for the Board has interpreted and applied it as conferring *ipso facto* permission on nonstruck employers to lockout their employees in response to a strike against a single employer, regardless of whether in fact such strike constitutes a threat to multi-employer bargaining. It is not very often that employers are so unwise or indiscreet as to admit that the true purpose of locking out their employees under such circumstances is "to enhance their bargaining position vis-a-vis the Union . . . [to] help bring down the Union's bargaining demands . . . [and] to increase the employers' bargaining strength with the Union." *Bagdad Bowling Alleys*, 147 NLRB No. 97, 56 LRRM 1301, 1302.

We think there cannot be the slightest doubt that the lockout *and* replacement of workers, who are perfectly ready and able to continue to work for their employers, is an offensive, punitive action. That a lockout and replacement sequentially follows a strike against a single employer does not mean it is a defensive action; this sequence merely creates a chronological pretext for the lockout and replacement. The Board was faultlessly accurate and realistic in

its conclusion in *The Kroger Co.*, 145 NLRB No. 26, 54 LRRM 1361, 1362:

> . . . there is . . . no valid reason why the non-struck employer should be entitled both to lock out his employees and continue to operate with temporary replacements for those employees. . . . [To] permit the non-struck employer to operate with replacements while his own employees are willing to work serves only to punish those employees because of their adherence to the striking union.

The court below stumbled in an analytical pitfall by failing to test the validity of the employers' lockout-replacement action here in the light of their avowed purpose. Their purpose, they said, was to preserve multi-employer bargaining from the effects of a whipsaw strike (R. 41). How then was the lockout and replacement of employees, who were willing to work, calculated to achieve *that* object? In other words, if their *true* purpose had been to avoid the adverse impact of a whipsaw strike on multi-employer bargaining, would it have made any difference whether they continued to operate with their own employees or with replacements? The answer is quite plainly "no," for their economic position vis-a-vis the single struck employer would be identical in either event.[5] It is only the locked out and replaced employees whose economic position and security are threatened in this situation.

In *Buffalo Linen* the Court said that, if a union which is party to multi-employer bargaining tries to pick off one

[5] We are not impressed with the argument that temporary replacements are necessarily less efficient than regular employees and, therefore, that productivity and profits for the nonstruck employer must be lower during the period that he has locked out and replaced his regular employees. This argument is of course wholly speculative. But it falls of its own weight when—as often is the case—replacements are paid less than the regular employees whom they replace. If the replacements are either supervisors or regular employees transferred from other locations, the argument similarly must fail.

employer at a time, the remaining employers need not sit by helplessly. Implicit in the fabric of that decision were two assumptions: first, that the struck employer has been forced to cease normal operations; second, that the nonstruck employers have ceased their normal operations in precisely the same way so as not to receive profits or other competitive advantage at the expense of the struck employer. Neither the holding nor the philosophy of *Buffalo Linen* is applicable to the instant case because neither factual assumption is present here. If either the struck employer or the nonstruck employers continues normal business operations, the lockout of employees is not economically justified as a defense to the strike, and the replacement of employees compounds the coercive, discriminatory nature of the lockout. See Brundage, The Lockout and Multi-Employer Bargaining, 14 Lab. L.J. 976, 983.

A danger in permitting nonstruck employers to lockout and replace their employees when one employer is struck is illustrated by *Food Giant Super Markets,* 145 NLRB No. No. 124, 55 LRRM 1146. There the union called a strike against a single food store employer in Tuscon. Fewer than twenty-five percent of that employer's employees went on strike, and in consequence the struck employer was able to continue his normal business operations. Nevertheless, each nonstruck employer in the unit locked out and replaced his employees, while continuing to do business with replacements, allegedly "in defense" against the union's strike. In such circumstances can it be realistically said that the lockout and replacement was economically justified to prevent whipsawing?

One can easily imagine that a strike called against a single employer, which fails to bring more than a handful of employees away from their jobs, might be the pretext for locking out and replacing thousands of employees. But, as here, where the effect of the union's initial strike does not close the struck employer and the nonstruck employers' decision is to continue operations with replacements, the lock-

out-replacement action is "indistinguishable from the outright firing of union employees in violation of section 8(a)(3)." 76 Harv. L. Rev. 1494, 1497.

## CONCLUSION

For these reasons and the reasons stated in the brief for the National Labor Relations Board, the judgment below should be reversed with instructions to enforce the Board's order.

Respectfully submitted,

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